

RECORDATION NO. 5676 Filed & Recorded

APR 20 1970 -9 32 AM

INTERSTATE COMMERCE COMMISSION

TEMPORARY CONDITIONAL SALE AGREEMENT

Dated as of April 1, 1970

between

PULLMAN INCORPORATED
(Pullman-Standard Division)

and

NORFOLK AND WESTERN RAILWAY COMPANY

TEMPORARY CONDITIONAL SALE AGREEMENT dated as of April 1, 1970, between PULLMAN INCORPORATED (Pullman-Standard Division), a Delaware corporation (hereinafter called the Vendor), and NORFOLK AND WESTERN RAILWAY COMPANY, a Virginia corporation (hereinafter called the Railroad).

WHEREAS, the Vendor has agreed to construct, sell and deliver to the Railroad, and the Railroad has agreed to purchase, the railroad equipment described in Schedule A hereto (hereinafter called the Equipment), which Equipment is to be constructed in accordance with the proposal and specifications referred to in Schedule A hereto (hereinafter called the Specifications); and

WHEREAS, in order that the Equipment may be delivered to and put to use by the Railroad pending consummation of permanent financing arrangements for acquisition of the Equipment, the Vendor has agreed that the Railroad may acquire possession of and the right to use the Equipment in accordance with and subject to the terms of this Agreement;

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements hereinafter set forth, the parties hereto agree as follows:

1. The Vendor will deliver the Equipment to the Railroad, f.o.b. the Railroad's tracks at the place and in accordance with the delivery schedule set forth in Schedule A hereto. The Vendor's obligation as to time of delivery is subject, however, to delays resulting from causes beyond the Vendor's reasonable control. The Railroad will cause each unit of the Equipment to be inspected by its inspector or other authorized representative at Vendor's plant referred to in Schedule A hereto. Upon delivery of each unit of the Equipment to the Railroad, an inspector or other authorized representative of the Railroad shall determine if such unit has been built in accordance with the Specifications; and if such be the case, he will execute and deliver to the Vendor a certificate of acceptance certifying to that effect and acknowledging receipt of delivery of such unit of the Equipment under this Agreement, whereupon the Railroad shall assume with respect thereto the responsibility and risk of loss.

2. The rights of the Railroad hereunder in respect of each unit of the Equipment shall commence on the date of acceptance thereof hereunder and end on July 31, 1970, or on the earlier date of payment to the Vendor of the purchase price

of such unit under permanent financing arrangements. Title to the Equipment shall remain in the Vendor, and the Railroad's right and interest therein is and shall be solely that of possession, custody and use as a conditional sale purchaser under this Agreement. Transfer of title to the Equipment shall be effected only at the time of delivery by the Vendor of a bill of sale of the Equipment either hereunder or under permanent financing arrangements. The terms of this Agreement shall be superseded in their entirety upon payment to the Vendor of the purchase price of all units of the Equipment under one or more conditional sale or other equipment financing agreements, pursuant to which the Equipment shall be delivered to and accepted by the Railroad, except the terms of paragraphs 4, 7, 8 and 9 hereof to the extent not covered by such permanent financing arrangements.

3. The base price per unit of the Equipment is set forth in Schedule A hereto. Such base price, which includes foreign line freight charges from the Vendor's plant to the place of delivery, is subject to such increase or decrease as may be agreed to by the Vendor and the Railroad, and the term "purchase price" as used herein shall mean the base price as

so increased or decreased. The Railroad hereby acknowledges itself to be indebted to the Vendor, and hereby promises to pay in cash to the Vendor, on or before October 1, 1970, the purchase price of each unit of the Equipment delivered to and accepted by the Railroad hereunder.

4. The Railroad agrees that it will permit no lien of any kind to attach to the Equipment and that it will pay promptly all taxes and assessments which may accrue or be imposed upon or in respect of the Equipment by reason of or in connection with the Railroad's possession, use or operation thereof under this Agreement. The Railroad's obligations contained in this paragraph 4 shall survive the termination of this Agreement.

5. The Railroad shall, at its own expense, keep and maintain the Equipment in good order and repair at all times. The Railroad shall pay to the Vendor the purchase price of each unit of the Equipment that may be lost, destroyed or irreparably damaged during the term of this Agreement.

6. Prior to delivery of each unit of the Equipment to the Railroad, it will be numbered with the appropriate road number set forth in Schedule A hereto. In contemplation of

subsequent delivery of the Equipment under permanent financing arrangements, the Railroad will, throughout the term of this Agreement, keep and maintain plainly, distinctly, permanently and conspicuously marked in stencil on each side of each unit of the Equipment, in letters not less than one inch in height, the following legend:

OWNED BY A BANK OR TRUST COMPANY UNDER A SECURITY
AGREEMENT FILED UNDER INTERSTATE COMMERCE ACT, SECTION 20c.

The Railroad may also cause the Equipment to be lettered "Norfolk and Western," "N&W," or in some other appropriate manner for convenience of identification of the interest of the Railroad therein.

7. The Railroad agrees to indemnify, protect and hold harmless the Vendor from and against all losses, damages, injuries, liabilities, claims and demands whatsoever, regardless of the cause thereof, and expenses in connection therewith, including counsel fees, arising out of retention by the Vendor of title to the Equipment, or out of the use and operation thereof by the Railroad during the period when title thereto remains in the Vendor. This covenant of indemnity shall continue in full force and effect notwithstanding the full payment

of the indebtedness in respect of the purchase price of the Equipment, as provided in paragraph 3 hereof, and the conveyance of the Equipment, as provided in paragraph 2 hereof, or the termination of this Agreement in any manner whatsoever.

8. The Vendor warrants that the Equipment will be built in accordance with the Specifications and warrants the Equipment will be free from defects in material (except as to specialties incorporated therein specified by the Railroad and not manufactured by the Vendor) or workmanship or design (except as to designs specified by the Railroad and not developed or purported to be developed by the Vendor) under normal use and service. The Vendor's obligation under this paragraph 8 shall be limited to making good at its plant any part or parts of the Equipment which shall, within one year after the delivery of such Equipment to the Railroad, be returned to the Vendor with transportation charges prepaid and which the Vendor's examination shall disclose to its satisfaction to have been thus defective. The Vendor agrees with the Railroad that the acceptance of a unit or units of the Equipment by the Railroad under paragraph 1 hereof shall not be deemed a waiver by the Railroad of any of its rights under this paragraph 8.

THIS WARRANTY IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

9. Except in cases of designs specified by the Railroad and not developed or purported to be developed by the Vendor, and articles and materials specified by the Railroad and not manufactured by the Vendor, the Vendor agrees to indemnify, protect and hold harmless the Railroad from and against any and all liability, claims, demands, costs, charges and expenses, including royalty payments and counsel fees, in any manner imposed upon or accruing against the Railroad because of the use in or about the construction or operation of the Equipment, or any unit thereof, of any design, article or material which infringes or is claimed to infringe on any patent or other right. The Railroad likewise will indemnify, protect and hold harmless the Vendor from and against any and all liability, claims, demands, costs, charges and expenses, including royalty payments and counsel fees, in any manner imposed upon or accruing against the Vendor because of the use in or about the construction or operation of the Equipment, or any unit thereof, of any design specified by the Railroad and not developed or

purported to be developed by the Vendor, or article or material specified by the Railroad and not manufactured by the Vendor, which infringes or is claimed to infringe on any patent or other right. The Vendor agrees to and hereby does, to the extent legally possible without impairing any claim, right or cause of action hereinafter referred to, transfer, assign, set over and deliver to the Railroad every claim, right and cause of action which the Vendor has or hereafter shall have against the originator of any design specified by the Railroad and not developed or purported to be developed by the Vendor or against the seller or sellers of any designs or articles or materials so specified by the Railroad and purchased or otherwise acquired by the Vendor for use in or about the construction or operation of the Equipment, or any unit thereof, on the ground that any such design, article or material or operation thereof infringes or is claimed to infringe on any patent or other right to the extent only that such claim, right or cause of action relates to the Equipment which is subject to this Agreement. The Vendor further agrees to execute and deliver to the Railroad all and every such further assurance as may be reasonably requested by the Railroad, more fully to effectuate the

assignment, transfer and delivery of every such claim, right and cause of action. The Vendor will give notice to the Railroad of any claim known to the Vendor from which liability may be charged against the Railroad hereunder and the Railroad will give notice to the Vendor of any claim known to the Railroad from which liability may be charged against the Vendor hereunder. Said covenants of indemnity shall continue in full force and effect notwithstanding the full payment of the indebtedness in respect of the purchase price of the Equipment, as provided in paragraph 3 hereof, and the conveyance of the Equipment, as provided in paragraph 2 hereof, or the termination of this Agreement in any manner whatsoever.

10. All or any of the rights, benefits or advantages of the Vendor, including the right to receive the purchase price of any unit of the Equipment or any other payments under this Agreement, may be assigned by the Vendor and reassigned by any assignee at any time or from time to time; provided, however, that no such assignment shall subject any such assignee to any of the Vendor's indemnities or any other obligations contained in this Agreement relating to the Equipment. In the event the Vendor assigns its rights to receive the payments to be made by

the Railroad under this Agreement and the Railroad receives written notice thereof from the Vendor, together with a counterpart of such assignment stating the identity and the post office address of the assignee, all payments thereafter to be made by the Railroad under this Agreement shall, to the extent so assigned, be made to the assignee against proper receipt therefor in form satisfactory to the Railroad.

11. In the event of any assignment by the Vendor of its right to receive any payments under this Agreement, the rights of such assignee to such payments as may be assigned, together with any other rights hereunder which can be and are so assigned, shall not be subject to any defense, setoff, counterclaim or recoupment whatsoever arising out of any breach of any obligation of the Vendor in respect of the Equipment or the manufacture, construction and delivery thereof or in respect of any indemnity contained in this Agreement nor subject to any defense, setoff, counterclaim or recoupment whatsoever arising by reason of any other indebtedness or liability at any time owing to the Railroad by the Vendor. Any and all such obligations, howsoever arising, shall be or remain enforceable by the Railroad against the Vendor only.

12. The Railroad will not sell, assign, transfer or otherwise dispose of its rights under this Agreement nor transfer possession of any unit or units of the Equipment to any other person or persons without first obtaining the written consent of the Vendor to such sale, assignment or transfer.

13. The Vendor agrees that upon receipt of all payments provided to be made to it by the Railroad under this Agreement, it will thereupon execute and deliver to or upon the order of the Railroad a bill of sale of the Equipment in customary form with full warranty of title, free and clear of all liens and encumbrances.

14. The Railroad will cause this Agreement, any assignment hereof and any amendments or supplements hereto or thereto to be filed and recorded with the Interstate Commerce Commission and otherwise as may be required by law or reasonably requested by the Vendor for the purpose of protection of its title to the Equipment and its rights under this Agreement or for the purpose of carrying out the intention of this Agreement.

15. The terms of this Agreement and all rights and obligations hereunder shall be governed by the laws of the Commonwealth of Virginia.


16. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, and such counterparts together shall constitute a single instrument.

IN WITNESS WHEREOF, the Vendor and the Railroad have caused this Agreement to be signed and acknowledged by their proper officers and their respective corporate seals to be hereunto affixed and duly attested, as of the day and year first above written.

PULLMAN INCORPORATED
(Pullman-Standard Division)

By 
Vice President

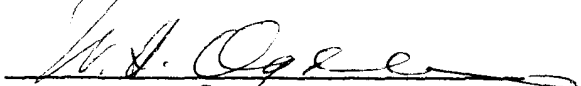
ATTEST:


Assistant Secretary

NORFOLK AND WESTERN RAILWAY COMPANY

By 
Assistant Vice President-Finance

ATTEST:


Secretary

J. J. Clifford
Notary Public

COMMONWEALTH OF VIRGINIA)
) ss.:
CITY OF ROANOKE)

Judy A. McLaury
Notary Public

My Commission Expires April 21, 1973

SCHEDULE A
 to
 TEMPORARY CONDITIONAL SALE AGREEMENT
 Dated as of April 1, 1970
 between
 PULLMAN INCORPORATED (PULLMAN-STANDARD DIVISION)
 and
 NORFOLK AND WESTERN RAILWAY COMPANY

<u>Type of Equipment</u>	<u>Specifications</u>	<u>AAR Symbol</u>
100-ton covered hopper cars with 4,740 cubic foot capacity (Vendor's Lot No. 9448)	Railroad's Specification dated 10/7/68; Vendor's proposal dated 4/21/69 and supplementary correspondence	LO

<u>Plant</u>	<u>Quantity</u>	<u>Railroad's Road Numbers (both inclusive)</u>
Butler, Pennsylvania	1,000	176000 - 176999

<u>Unit Base Price</u>	<u>Total Base Price</u>	<u>Delivery</u>
\$15,400	\$15,400,000	At Lodi, Ohio, from April through June, 1970.